marked (Petition for Rehearing, p. 3). About half an hour later Mr. Singer was informed by petitioner, who had arrived in Philadelphia from Boston after the call of the calendar, thta Mr. Dangle's operation for bladder trouble, which had been a possibility, was now necessary, and Mr. Dangle thus could not appear as expected (R. 10a).

Mr. Singer immediately, the same day, advised the Court of this development and attempted to obtain an adjournment of the trial (R. 6a).*

The next day in the formal argument the Court was advised that much of the defense files were still in Boston (R. 11a) and petitioner protested twice against being forced to trial without his chosen defense counsel (R. 12a, 108a). Petitioner was forced to trial by the trial judge not on the basis of any dilatory conduct by petitioner, but solely as expressed in his own words (R. 12b):

> "I have made my ruling for the reasons I stated yesterday, that the issue under the cases is whether or not the defendant has a competent counsel, and I have ruled that Mr. Singer is a competent counsel, and it is my understanding of the cases that as long as he has competent counsel, then the

*The terms on which the court below based its opinion, that is that the defendant was derelict in not making his application for an adjournment until the next day, is completely without factual foundation. The trial minutes, as well as the undisputed affidavit of Mr. Singer on the petition for rehearing, shows that the application for the adjournment was made to Judge Lord, the assignment judge *before* Trial Judge Van Dusen was assigned, and that Mr. Singer attempted unsuccessfully to communicate with Judge Van Dusen as well the *same day*. The minutes of the argument of the motion for a new trial on October 30, 1957, show clearly (pp. 42-3) that Mr. Singer attempted to communicate with the Trial Judge the same day.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 451

JOEL ROSENBERG, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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CITATIONS

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Supreme Court of the United States

OCTOBER TERM, 1958

No. [illegible]

JOEL ROSENBERG, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOEL ROSENBERG, petitioner, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on July 22, 1958, which affirmed a judgment of conviction after a trial in the United States District Court for the Eastern District of Pennsylvania before the Honorable FRANCIS L. VAN DUSEN, District Judge, and a jury, and a sentence of five years for transporting in interstate commerce a fraudulently obtained check in violation of Title 18, U.S.C. § 371, and a three year suspended sentence for

conspiring to transport said check in interstate commerce in violation of Title 18, U.S.C. § 2314, and from the final order of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on August 15, 1958, denying the application of petitioner for a re-hearing of his appeal.

CITATIONS TO OPINIONS BELOW

The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra,* p.2a, is reported in 257 F. 2d 760. The opinion of the District Court is a part of the certified record herein and is reported in 157 F. Supp. 654.

JURISDICTION

The Judgment of the Circuit Court of Appeals was entered on July 22, 1958 (App. B, p. 8a, *infra.*) Rehearing was denied on August 15, 1958.

On ~~October 14~~ Sup 9, 1958, the Honorable William J. Brennan, Jr., Associate Justice of the Court, granted petitioner's application for an order extending his time to file a petition for a Writ of Certiorari to and including October 14, 1958.

The Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1) and Rule 22(2).

QUESTIONS PRESENTED

Question I

Is the rule of this Court in *Jencks* v. *United States,* 1957, 353 U.S. 657, a rule of mere procedure, or does it involve a defendant's constitutional rights? May a clear violation of this rule be harmless error? May the conceded error of a trial court in withholding from defense counsel prior statements of principal

Government witnesses be excused because a Circuit Court finds that the defense was not hampered in cross-examination of those witnesses? Is it proper for a Circuit Court to determine what use defense counsel might have made of statements erroneously withheld?

Question II

Is the test of a defendant's right of counsel under the Sixth Amendment the competency of such counsel, or whether defendant has counsel of his own choosing? May a defendant, whose chosen trial counsel is temporarily unavailable due to sudden illness be compelled, over his objection, to go to trial represented by a local liaison attorney because the trial court believes such counsel to be competent?

Question III

May a jury be informed by the prosecution of the objects that were seized from a defendant when the seizure itself has been suppressed as illegal? Where a defendant is charged with obtaining $5,760 by fraud, may a jury be told that he had $6,260 in his possession when a district court had already ruled that there was no evidence to show any connection between the alleged crime and the money in defendant's possession when arrested?

STATUTE INVOLVED

The statutory provisions involved are paragraphs (a), (b), and (c) of Title 18, U.S.C., Sec. 3500, Public Law 85-269, 71 Stat. 595 (1957). They are printed in Appendix A, *infra*, pp. ——.

STATEMENT

On January 6, 1958, petitioner was found guilty of (1) conspiring to transport in interstate commerce a fraudulently obtained check in the sum of $5,760.00 in violation of Title 18, U.S.C. Sec. 317 and Sec. 2314, and (2) transporting the said check in interstate commerce in violation of Title 18, U.S.C. Sec. 371. (R. 4a-6a) He was sentenced to five years imprisonment on the substantive count, and a suspended three year sentence on the conspiracy count.

Two to three months prior to the trial petitioner had retained and paid Edward M. Dangel, Esq., a Boston attorney, to defend him at the trial (R. 7a, 12a). Stanley B. Singer, Esq., of Philadelphia, pursuant to local court rule, appeared as local counsel. On the call of the trial calendar Mr. Singer, believing Mr. Dangel would arrive from Boston in time, answered "ready" and the case was so marked (Petition for Rehearing, p. 3). Later the same day Mr. Singer was informed by petitioner, who had arrived in Philadelphia from Boston a half-hour after the call of the calendar, that Mr. Dangel's operation for bladder trouble which had been a possibility was now necessary, and Mr. Dangel thus could not appear as expected (R. 10a).

Mr. Singer sought an immediate adjournment, which was refused (R. 6a), even though much of the defense files were still in Boston (R. 11a). Petitioner personally protested being compelled to stand trial without his chosen defense counsel (R. 12a).

Petitioner was forced to trial by the trial judge on his finding that Mr. Singer was competent to conduct the defense notwithstanding the concededly unavoidable absence of petitioner's paid and chosen chief

counsel and of most of the Defendant's trial preparation files. The Circuit Court, in its decision herein (Appendix B, *infra*, p. —) went outside the record to erroneously ascribe other motives to the defense's first and only request for an adjournment, but the trial judge stated the issue very clearly when he said (R. 12b):

> "I have made my ruling for the reasons I stated yesterday, that the issue under the cases is whether or not the defendant has a competent counsel, and it is my understanding that as long as he has competent counsel, then the requirements of the Sixth Amendment are fulfilled."

In the decision appealed from, the Circuit Court held that the trial judge erred in his interpretation of the rule of *Jencks* v. *United States*, 1957, 353 U.S. 657 and of Title 18, U.S.C. Sec. 3500 in that the defense was entitled to a disclosure of certain statements made by prosecution witnesses (Appendix B, *infra*, p. —), but that this error was not prejudicial to petitioner.

REASONS FOR GRANTING THE WRIT

I

The decision of the court below, in that it holds a clear and patent denial of the rights of a defendant under the rule of *Jencks* v. *United States*, 1957, 353 U.S. 657 and Title 18 U.S.C. 3500, not to be reversible error, is in direct conflict with the decision of the Sixth Circuit in *Bergman* v. *United States*, 6 Cir., 253 F. 2d 933. In the instant case, the court below requires both error under the Jencks rule *and* a showing of prejudice for a reversal. In the *Bergman* case (*supra*) the Sixth Circuit held that there was no likelihood of prejudice in that case, but that a circuit court did not have the right, under the Jencks rule, to even

consider whether such error prejudiced the defendant therein. It's statement on this point was clear and forthright and permits of no misinterpretation:

> ". . . it is not proper for this court to determine whether the appellants were prejudiced by failure to make available the prior statements of a witness, any more than it would be proper for the trial court to determine whether a prior statement of a witness should be turned over to a defense counsel on the basis of whether the statement is inconsistent with the witness's testimony in open court.
>
> "The petition for a rehearing seems to imply that the Jencks case removed this function from the district court only to place it within the province of the Court of Appeals. We are not disposed to adopt that view. . . ."

On this same question the Second Circuit has taken a position consistent with that of the court below in *United States* v. *Sheba Bracelets, Inc.*, 2 Cir., 248 F. 2d 134, cert. den. — U.S. —, 78 S. Ct. 330. The Seventh Circuit took a contrary position consistent with that of the Sixth Circuit, on its rehearing after the Jencks decision, in *United States* v. *Killian*, 7 Cir., 246 F. 2d 77, 82, where there was no showing of prejudice. And in *Riser* v. *Teets*, 9 Cir., 253 F. 2d 844, cert. den. June 30, 1958, the majority of the Ninth Circuit agreed with the court below, although there was a vigorous dissent. In *Riser* v. *Teets* (*supra*) the petition for a writ of certiorari did not bring this conflict of courts of appeal to the attention of this Court.

This case thus presents this court with a state of affairs where five courts of appeal are in fundamental disagreement as to a basic interpretation and application of the decision of this court in *Jencks* v. *United*

States (*supra*). The question here is thus one which must necessarily be decided in each and every single case where error under the Jencks rule is found by a court of appeals, and there would be striking lack of uniformity of decision if courts of appeal were to continue to answer this question differently.

The court below, and the Second Circuit in *United States* v. *Sheba Bracelets, Inc.* (*supra*) have decided this question in a manner which opens the door to a watering down of the Jencks rule. These decisions substitute the judgment of a court of appeals for that of defense counsel on the question of the importance to the defense of the implementation of an unquestioned right. The Sixth and Seventh Circuits regard the Jencks rule as involving not mere procedure, but substantive rights which are a part of due process, an interpretation which was also clear to the Congress. Thus, Senate Report No. 981 accompanying Public Law 85-269, 71 Stat. 595 declared:

> "The proposed legislation is not designed to nullify, or to curb, or to limit the discussion of the Supreme Court insofar as due process is concerned. The Committee believes that legislation would clearly be unconstitutional if it sought to restrict due process."

Based on speculation as to the use which defense counsel might have made of the statements withheld, the court below has ruled that a defendant may be deprived of a substantial right unless it is plain that he was prejudiced. This court should note that defense counsel still have not seen the statements erroneously withheld and had not and could not even now have any way of demonstrating to either the Court of Appeals or to this court what use might have been made of them on the trial.

requirements of the Sixth Amendment are fulfilled."

This is an erroneous statement of the law. The Third Circuit in the leading case of *United States* v. *Bergamo*, 3 Cir., 154 Fed. 2d 31, 1946, stated the law to be as follows:

> "The Sixth Amendment provides 'in all criminal proceedings the accused shall have the right to have the assistance of counsel for his defense.' The Supreme Court held this right to the assistance of counsel includes the right to the counsel of the defendant's choosing."

See also: *Chandler* v. *Fretag*, 348 U.S. 3;

Craig v. *United States*, 6 Cir., 217 F. 2d 355;

Melanson v. *O'Brien*, 1 Cir., 191 F. 2d 963;

United States v. *Koplin*, 7 Cir., 227 F. 2d 80.

In forcing petitioner to go to trial with substitute counsel on one day's notice, did not the trial violate the rule laid down by this Court in *White* v. *Ragen*, 324 U.S. 760, 763-4, as follows:

> "We have many times repeated that not only does due process require that a defendant on trial . . . shall have the benefit of counsel [citing cases] but that it is a denial of the accused's constitutional right to a fair trial to force him to trial with such expedition as to deprive him of the effective aid and assistance of counsel."

III

The gravamen of the crime with which petitioner was charged was obtaining $5,760 by fraud. Seven months later, when arrested, petitioner had $6,260 in

cash in his possession, of which $6,000 was seized. (R. 54a). Judge J. Sam Perry, in the U. S. District Court for the Northern District of Illinois held that the seizure was unlawful and ordered the money returned to petitioner. Nevertheless the Government persistently and deliberately emphasized to the jury that this $6,000 had been seized from petitioner. (R. 54a-62a).

The introduction of such evidence, in these same circumstances, was specifically and forcefully condemned by the Second Circuit in *In re Ginsburg*, 2 Cir., 147 F. 2d 749, cited with approval by this Court in *Harris* v. *United States*, 331 U.S. 145, 154.

If the seizure was wrongful, testimony as to articles seized was likewise wrongful.

McGinnis v. *United States*, 2 Cir., 227 F. 2d 598.

It would vitiate the entire body of law on search and seizure to permit a defendant to be convicted on the basis of evidence as to monies found in his possession which approximate in amount that which he is charged with having obtained by fraud, and which a district court has already held to have been wrongfully seized and ordered returned to the defendant.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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October 14, 1958